look at everything the knowledge of which may enable him to do justice between the parties. The plaintiff was entitled to move under Order XXIX, rule 10, but, especially having regard to rule 14, I do not think that where a defence has actually been put in, rule 10 can be construed as obliging the court to pay no attention to it, because it was put in after time and without leave."

In the present case, the statement of defence while admitting the execution of the hire-purchase agreement and giving the plaintiff representations, contends the reference should be made to its full terms and effect and that the representations are correct and in no way false or fraudulent and/or with any intention to mislead the plaintiff. The defendants further allege that the defects were due to the failure of the plaintiff and/or his servants and agents and the lack of proper maintenance of the said machine by them in contravention of the recommended user thereof by the defendants. Further, routine service of the new machine and effective repairs were carried out with spare parts readily available at all material times. They also aver that the implied conditions were excluded and in the alternative that the said machine was of merchantable quality. I remember in the course of argument it was stated that the said machine was sold to a third party after it was taken back by the defendants on the failure of the plaintiff to pay any of the instalments according to the agreement. The defendants also filed a counterclaim against the plaintiff for arrears of such instalments in consequence of which the defendants repossessed the machine.

The cases cited by the learned counsel for the plaintiff are easily distinguishable because the applications therein are to set aside judgment or order made in default. In the *Safety Insurance Co. Ltd.* v. *Hua Seng Electric Co.*[3] and *Packirisamy* v. *Janagi,*[4] Order 19 rule 3(3) of the Subordinate Courts Rules, 1950, applies so that apart from the necessity for the applicants to show there was a good defence in the action, the rule requires a good reason to be given for his absence when judgment in default was ordered against him. Ali J. (as he then was) in the first case cited above, also held that the practice adopted by the High Court in a similar matter was not applicable. The case of *The Chinese Tin Mines Rehabilitation Loans Board* v. *Chee Hoi Voon*[5] was concerned with a motion to set aside a judgment in default of defence under Order 13 rule 10 of the Rules of the Supreme Court. It was held that if the judgment was a regular judgment then it is an almost inflexible rule that there must be a certificate of merits stating facts showing a substantial ground of defence. Lapse of time is no bar to the application. In *Tang Chok Ching* v. *Wong Ik Tieng & Ors.,*[6] the Federal Court made a similar ruling where judgment was given in default of appearance in the court of the first instance. It was the duty of the appellant to show the judgment was irregular or that he had a *prima facie* defence on the merits.

In the present case, judgment in default has not yet been obtained. The courts in a case of this nature prefer that it be decided on merits and do not invoke procedural rules to prevent a defendant from defending an action unless it has no merits in his application. (*per* Mathew C.J. in *Foo Chiew Fong* v. *Guriman*[7]).

In the circumstances I am of the opinion that there are merits in the defence and evidence ought to be called, particularly in respect of the hire-purchase agreement to satisfy the court as to the terms thereof and the implied conditions and other matters raised by the defence and relevant to the case in order that justice can be done.

The application is allowed and the time to file the defence is extended.

I order that the plaintiff be compensated for by the payment of costs to which he should be entitled in the circumstances. (*Atwood* v. *Chichester*[8]).

By consent the amended statement of defence and counterclaim are to be filed within one week from today with costs to the plaintiff.

The notice of motion by the plaintiff is dismissed.

Order accordingly.

Solicitors: *R.C. Murugeson; Karpal Singh & Co.*

ZULKARNAINI BIN MOHAMED NOOR v. SYED OMAR BIN MOHAMED & ANOR.

[O.C.J. (Mohamed Zahir J.) December 10, 1978]
[Kuala Trengganu — Election Petition No. 16 of 1978]

Election — Election petition — Amendment of — Application to amend date — Whether allowable — Election Offences Act, 1954, ss. 32, 33(4), 34, 38(1) & (2), 42(1).

The petitioner sought to amend his election petition filed on September 3, 1978. He quoted in his petition that the date of the election was on July 8, 1978 and he sought to amend it to June 21, 1978 and to add another clause to the petition to read as follows: "And such non-compliance has affected the result of the said election."

Held, dismissing the application: (1) the date describes the election and if one were to present an election petition in which the date of the election is wrongly quoted then the election is non-existent although there is a mistake on the part of the petitioner;

(2) in the case of an election petition, time to present the election petition is as short as 21 days and if amendments are sought beyond this period the case is already time-barred and the court ought not to allow such amendment;

(3) failure to comply with the Election Offence Act in filing the petition allows the Election Judge to dismiss the petition. That being the case, the petitioner ought not to be allowed to amend his petition which was a nullity.

Cases referred to:-

(1) *Muip bin Tabib* v. *Dato James Wong* [1971] 1 M.L.J. 246.
(2) *Tildesley* v. *Harper* (1878) 10 Ch. D. 393.
(3) *Attorney-General* v. *West Ham Corporation* (1910) 74 J.P. 196.
(4) *Hipgrave* v. *Case* 28 Ch. D. 361.
(5) *Chong Thain Vun* v. *Watson & Anor.* [1968] 1 M.L.J. 65.
(6) *Stevens* v. *Tillett* (1870) L.R. 6 C.P. 147.
(7) *Abu Bakar* v. *Mohamed Zain* [1967] 1 M.L.J. 168.
(8) *Dean* v. *Wiesengrund* [1955] 2 Q.B. 120.
(9) *Colguhoun* v. *Brooks* (1888) 21 Q.B.D. 52.
(10) *Tengku Korish* v. *Mohamed bin Jusoh* [1970] 1 M.L.J. 6.
(11) *Devan Nair* v. *Yong Kuan Teik* [1967] 1 M.L.J. 261.
(12) *Steward* v. *The North Metropolitan Tramways Company* (1885) Q.B.D. 178.

ELECTION PETITION.

S. Sivasubramanian for the petitioner.

Datuk Mohamed Yusof bin Abdul Rashid (Federal Counsel) for the 1st respondent.

Raja Abdul Aziz Addruse for the 2nd respondent.

Mohamed Zahir J.: The petitioner by notice applies to amend his election petition filed on September 3, 1978, where he seeks for an order that the second respondent be determined not to be duly elected and the election for the Trengganu State Constituency of Cukai was void. He quoted in his petition that the date of the election was on July 8, 1978. He now seeks to amend the date to be June 21, 1978 and also to add another clause to paragraph (3)(f) of the petition to read as follows: —

"And such non-compliance has affected the result of the said election."

It appears to me what prompted the petitioner to seek these amendments is the recent decisions of various Election Judges that the date of elections held this year in petitions where there were no contests was June 21, 1978, the nomination day and on July 8, 1978 in contested elections where there were polling and voting. The other amendment sought was also on similar ground that it had been held by some courts that the petitioner must plead the allegation in his petition that the non-compliance with the law has affected the result of the election, otherwise the petition would be defective.

The petitioner earlier on October 8, 1978 filed a similar application by way of summons-in-chambers before the Senior Assistant Registrar seeking the same amendments. The summons was dismissed by the Senior Assistant Registrar holding that he had no jurisdiction to hear the application and which decision in my view is correct in the light of section 33(4) of the Election Offences Act, 1954 which provides that all interlocutory matters in connection with an election petition may be dealt with and decided by any Judge of the High Court unless otherwise ordered by the Chief Justice. The petitioner now files this notice for amendment before me.

The 1st respondent on November 8 filed a notice of motion for dismissal of the petition for non-compliance with section 34 of the Act and rule 4(1) of the Rules which deal with the right of any person to present the petition and also on the ground that the petition does not satisfy the requirements of section 32 of the Act which provides the grounds for avoidance of an election. It is to be noted that it is under section 32 of the Act that it has been held that the petitioner must plead in his petition the non-compliance of the law by the respondent and such non-compliance affected the result of the election (*Muip bin Tabib* v. *Dato James Wong*[1]).

The 2nd respondent on November 13, 1978 also filed a similar notice of motion to strike out the petition under the same section 34 of the Act and also on the ground that there was no election held on July 8, which date the petitioner is now seeking to amend and further that the petitioner has not given sufficient security for costs as required by the rules.

Counsel for the petitioner submitted that the court has jurisdiction to entertain the application under Order 28 rule 1 of the Rules of the Supreme Court. He quoted the *Annual Practice* 1957 page 454 where in *Tildesley* v. *Harper*[2] Bramwell L.J. said: —

"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise."

Counsel pointed out on page 456 of the Annual Practice where a plaintiff was allowed to amend by adding a new claim which is "so germane to, and so connected with the original cause of action, that it would be a denial of justice, if leave to amend it were refused" (*Attorney-General* v. *West Ham Corporation*[3]).

Counsel for 1st respondent submitted that in so far as Order 28 rule 1 of Rules of the Supreme Court is concerned the court will not readily allow at the trial an amendment the necessity for which was abundantly apparent months ago, and then not asked for (*Hipgrave* v. *Case*[4]). He also referred to page 460 of 1957 *Annual Practice* instances where leave was not allowed such as where such amendments would prejudice the right of the opposite party or where the amendment if allowed would set up a fresh claim which has become statute-barred and he also quoted *Mallal's* Supreme Court Practice at page 343 that the court should not deprive a party of his entitlement to the benefits of the statute of limitations.

Another point submitted by counsel for 1st respondent is that the power of an Election Judge to allow amendments is restricted to the extent as envisaged by the election laws. He referred to the case of *Chong Thain Vun* v. *Watson & Anor.*[5] where the service of notice of presentation of petition was not effected within 10 days and the petition was set aside as it was held that Election Petition Rules are mandatory and require strict compliance therewith. He also referred to *Stevens* v. *Tillett*[6] where Bovill C.J. at page 155 stated as follows: —

"The jurisdiction of this court as regards the trial of election petition, depends entirely upon the Parliamentary Elections Act, 1868; and the decisions of the election judges must be governed by the provisions of that statute."

I do not think there is any difference of opinion on the point that the power of the court is governed by the Elections Act and the Rules made thereunder. For that matter it is equally true in all other cases; for instance in land matters or small estates, the powers of the court as regards these matters must necessarily be governed by the National Land Code or the Small Estates Distribution Act, 1955. This is also in line with the principle laid down in *Abu Bakar* v. *Mohamed Zain*[7] where the learned judge held that subject to section 38(2) and 42(2) of the Election Offences Ordinance, 1954 and Election Petition Rules, 1954, the Rules of the Supreme Court, 1957 are applicable in election cases.

But I would, with respect, differ with the ground of the learned judge in that case who in disallowing an application for amendment to introduce fresh allegations of corrupt practice stated that if such application was allowed, it would amount to permitting the

petitioner to file a fresh petition thereby depriving the respondent the benefit of limitation. To my mind the ground should have been such amendment is expressly disallowed by section 38(2) of the Act.

Counsel for 2nd respondent submitted that the amendments sought by the petitioner is not just a question of costs but a question of depriving the respondents of points that may enable the respondents to succeed in their application to dismiss the petition. He contended that the amendments sought are not realised for first time but since 1971 when these points were raised and decided in *Muip's* case. He also referred to section 38(1) and (2) of the Election Offences Act as to time of presentation of election petitions which depends on the nature of the charge or accusation. Upon the ground of corrupt practice within 28 days after date of payment or act and in case of illegal practice 14 days after date of publication in *Gazette* or within 28 days after payment or other act and in all other cases within 21 days after publication of the result in the *Gazette*. Section 38(2) reads as follows: —

"An election petition presented in due time may, for the purpose of questioning the return or the election upon an allegation of a corrupt or illegal practice, be amended with the leave of a judge of the High Court within the time within which an election petition questioning the return or the election upon that ground may be presented."

Counsel then quoted the maxim of *expressio unius exclusio alterius* as referred to in the case *Dean* v. *Wiesengrund*[8] where matters expressly mentioned may be regarded as comprehensive, complete and all-inclusive. That was a tenancy case concerning the suit of an executor of a deceased tenant against the landlord claiming for a sum paid in excess of the standard rent. The dispute was whether the executor of the tenant had a right of claim in view of the fact that section 14(1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 while giving a tenant a right to recover the excess rent from his landlord restricted that right to the tenant by whom the excess had been paid. It was held in that case that the wording of section 14(1) was not sufficient to deprive the tenant's estate of an asset given to the tenant by the statute. On page 131 Jenkins L.J. in holding that the maxim was not applicable cited Lopes L.J. who in *Colquhoun* v. *Brooks*[9] commented on the maxim as follows: —

"The *maxim expressio unius, exclusio alterius,* has been pressed upon us. I agree with what is said in the court below by Wills J. about this *maxim.* It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice."

And at page 138 Morris L.J. in the same *Dean's* case stated that he failed to see how the maxim can be applied to the provision in the 1917 and 1920 enactments since as pointed out by him decisions of policy might account for the provisions enacted.

For similar reason, I fail to see how the maxim is applicable to our case here. Section 38(2) of the Election Offences Act gives express provision for amendments within the time prescribed in cases founded on the allegation of a corrupt and illegal practice.

The Act and the Rules do provide amendments for the petitions to be made. Section 33(4) of the Act provides for interlocutory matters to be dealt with. The Act and the Rules are therefore not comprehensive, complete and all-inclusive.

It has been established that the court will not grant time for extension of time as it is not expressly provided in the Election Act. In *Tengku Korish* v. *Mohamed bin Jusoh & Anor.*[10] the petitions had been dismissed for failure to file them within time. It was held in that case that statutory requirements of an election law were mandatory and must be strictly observed. Also in *Devan Nair* v. *Yong Kuan Teik*[11] where it was held Election Petition Rules vest no general power in the election judge to extend time on the ground of irregularity.

But it would appear that the Election Act and the Rules provide provisions concerning amendments on the following occasions: —

(a) Section 38(2) of the Act, amendment affecting corrupt or illegal practice to be made within the time the petition may be presented;

(b) Rule 7, judge may grant leave to amend the list of votes in cases of complaint on the petitioner having a majority of lawful votes;

(c) Rule 8, judge may grant leave to amend the list of objection to the election in cases of complaint of undue return.

Thus, in so far as the amendments for the above, the court must act strictly in compliance with the Act and rules whereas other amendments should ordinarily come under section 42(1) of the Act which provides that the procedure and practice on election petitions shall be regulated by rules of the court. Subsection 2 of the same section provides that the rules under the Act shall be in force until varied or revoked by rules of court.

Now the question before me to decide is whether I have power to allow the amendments sought. First, I have to search for any provision in the Election Act and the rules concerning the proposed amendments prohibiting me from doing so. I do not see any such provisions. So I come to the conclusion I have power to allow the amendment under the Rules of the Supreme Court. Then the next question is whether I should allow or refuse the amendment under the Rules of the Supreme Court. The grounds I have to consider here as submitted by counsel for the respondents are as follows: —

(a) Whether by the amendment, petitioner has done some injury to his opponent which cannot be compensated for by costs or otherwise;

(b) Whether the amendment would prejudice the rights of the respondents by setting up a fresh claim which since the issue of the petition has become barred by limitation.

I do not think this application for amendment is made *mala fide* and I do not think there has been delay in seeking the amendment as the petitioner filed the application well before the filing of the motions by the respondents, although before a wrong officer.

In *Steward* v. *The North Metropolitan Tramways Company*[12] where the defendant company sought to amend their defence by adding an allegation that the liability to maintain the roadway had been transferred to the local authority of the district it was held that as the six months within which, by statute, notice of action must be given to the local authority had elapsed, and the remedy against them was lost to the plaintiff, his position would be prejudicially affected by the proposed amendment, and it therefore ought not to be allowed.

In the case before us other courts have been dismissing petitions for having pleaded that the elections were held on July 8 and for failure to plead the non-compliance of the provisions of the law. Even as long ago as 1971 in *Muip's* case it was held these defects were fatal to the petitioner's case. It could therefore be reasonably concluded that the amendments if allowed would cause the respondents injury which cannot be compensated with money.

The other ground whether the amendments would allow a fresh cause of action which has been statute-barred? If one were to consider the effect of the amendment at first glance one cannot seriously say the amendments would transform the petition into a new petition by just amending the date. In ordinary cases founded on contract or tort where the same facts are pleaded but the dates are quoted erroneously, one may say that the suit is the same one even though amendment is allowed. But in election petitions if we look at the form in which the petition is to be presented which is under rule 4(4), it expressly provides for the description of the election which is as follows: —

"Election for ..... holden on the ..... day of ..... 19....."

and paragraph 2 of the said form provides as follows:

"And your petitioners state that the election was holden on the ..... day of ..... 19..... when A.B., C.D., and E.F., were candidates, and the Returning Officer has returned A.B. as being duly elected."

Thus the date describes the election and if one were to present an election petition in which the date of the election is wrongly quoted then we cannot but come to the conclusion that such election is non-existent, although we very well know that there is a mistake on the part of the petitioner. The petition has become therefore a nullity at the date of filing. In cases founded on contracts or torts, the court may at times allow amendments if they are still not statute-barred. But in the case of election petition, time to present the election petition is as short as 21 days and if amendments are sought beyond this period the case is already time-barred and the court ought not to allow such amendment.

The same reasoning follows on the application for the amendment on the fact of non-compliance of the law to be inserted in the petition. It has been held in the case of *Muip's* case that such failure renders the petition defective and it would appear in this case that it is mandatory for the petitioner to plead in his petition that non-compliance affected the result of the election. If this is being the case, then to allow amendment would revive a defective petition and render it valid beyond the statutory period.

It is also pertinent to quote here rule 16:

"On the expiration of the time limited for making petitions, the petition shall be deemed to be an issue."

In *Devan Nair's* case Lord Upjohn at page 265 states as follows:

"The Election Judge must however, have an inherent power to cleanse his list by striking out or better by dismissing those petitions which have become nullities by failure to serve the petition within the time prescribed by the Rules."

Thus, failure to comply with the Act, as in this case, in filing the petition allows the election judge to dismiss the petition. This being the case, the petitioner ought not to be allowed to amend his petition which is a nullity.

The necessity of speedy and final determination is quite understandable as we do not want a member of our Parliament or State Assembly who is responsible for our security and prosperity, may be a cabinet member, to be uncertain of his seat if his position as such member is being threatened by endless election litigations which may go even beyond the term of his office. But at the same time one must consider what would happen if a member is elected as a result of corrupt practices and that his opponent's election petition is dismissed on technical grounds. I am not suggesting anything of this nature had happened in the previous elections held in our country but what will happen in the future we are not able to fathom. Whilst the law makes it not difficult to have an election petition dismissed on technical grounds, at the same time it makes it hard to withdraw the same after it has been duly presented. Perhaps the law should be reviewed so as to make it more realistic.

The other point is that the decision of election judges is not appealable. I do not think election judges do not make mistakes whereas other judges do. We are all not infallible. What then happens if an election judge commits an error? An election judge has powers to unseat a Prime Minister in an election petition. It appears to me the aggrieved party has no remedies under the law. Perhaps this matter can be also considered so as to safeguard against errors made. Perhaps a quick reference after judgment to the Federal Court within a short period of time to be provided in the law is the answer.

Returning to this case, on the reasons I have given, I dismiss the application by the petitioner with costs.

Application dismissed.

Solicitors: *S. Sivasubramanian; Rithauddeen & Aziz.*